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Victor I. Vieth

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PASSOVER IN MINNESOTA: MANDATED REPORTING AND THE UNEQUAL PROTECTION OF ABUSED CHILDREN

Victor I. Vieth[†]

“The blood shall be a sign for you on the houses where
you live: when I see the blood, I will pass over you. . . .”*

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[†] Senior Attorney, National Center for Prosecution of Child Abuse, Alexandria, Virginia. J.D. 1987, Hamline University School of Law; B.S., 1984, *magna cum laude*, Winona State University.

* *Exodus* 12:13 (NRSV). According to the Bible, God sent a series of plagues upon Egypt in order to free the Israelite slaves. The final plague called for the death of the firstborn son of each Egyptian. The Israelites, however, were to sprinkle blood on their door frames and the Lord would pass over their homes. *Exodus* 6:12 (NRSV).

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I. INTRODUCTION

Minnesota law requires that various professionals report to the authorities when they have reason to believe a child is neglected or physically or sexually abused.¹ The purpose of this requirement is to "protect children whose health or welfare may be jeopardized" as a result of abuse or neglect.²

The report is made either to the local social service agency or to the police department.³ Law enforcement and social services are then obligated to coordinate an investigation of the report.⁴ The

1. See MINN. STAT. § 626.556, subd. 3 (1996).

2. MINN. STAT. § 626.556, subd. 1 (1996).

3. See MINN. STAT. § 626.556, subd. 3(a) (1996). The county sheriff is also an acceptable recipient of the report. See *id.*

4. See MINN. STAT. § 626.556, subd. 10 (1996). Law enforcement is only obligated to get involved if the report alleges a violation of the criminal code involving sexual abuse, physical abuse, or criminal neglect or endangerment. See *id.* Criminal neglect includes the willful deprivation of "necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health. . . ." MINN. STAT. § 609.378, subd. 1(a)(1) (1996). Endangerment includes exposing a child to drug trafficking or "intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death. . . ." *Id.*, subd. 1(b)(1). Although law enforcement is only required to coordinate an investigation in cases of physical abuse, sexual abuse or neglect which has or is likely to "substantially harm" the child, every case worthy of social service intervention is also a candidate for a criminal charge because it is a misdemeanor to contribute to a child's need for protection or services. MINN. STAT. §

investigation may result in a petition alleging the child to be in need of protection or services ("CHIPS petition").⁵ A CHIPS petition seeks to remedy the conditions in the home which resulted in abuse or neglect.⁶ A child abuse investigation may also result in the filing of criminal charges.⁷

A successful CHIPS investigation protects the child by (1) providing services to the victim and his family, and (2) punishing the perpetrator.⁸ Protection of the child, however, is dependent on the authorities receiving an initial report of abuse. Absent a report, there will be no investigation leaving the abused child without hope of protection, save the unlikely mercy of his perpetrator.⁹

Contrary to its stated purpose of protecting children, Minnesota's mandated reporting law excludes thousands of abused children from its coverage.¹⁰ For instance, no report is required when

260.315 (1996).

5. See MINN. STAT. § 260.015, subd. 2a (1996).

6. See MINN. STAT. § 626.556, subd. 10(a) (1996). The emphasis on family preservation apparently led the legislature to make it very difficult to terminate parental rights even in cases of sexual abuse and severe physical abuse. See Victor I. Vieth, *The Mutilation of a Child's Spirit: A Call for a New Approach to Termination of Parental Rights in Cases of Child Abuse*, 20 WM. MITCHELL L. REV. 727 (1994). Eventually, the legislature changed course and recognized "egregious" acts of child abuse to be a basis for terminating parental rights. MINN. STAT. § 260.221(1)(b)(6) (1996). Regrettably, the statute poorly defines egregious abuse. For instance, paying a child for sex is specifically mentioned as one example of egregious harm but no mention is made of the more likely event in which a child is sexually assaulted and receives no financial remuneration. See Minn. Stat. § 260.221, subd. 1 (1996); MINN. STAT. § 260.015, subd. 29 (1996).

7. See MINN. STAT. § 626.556, subd. 10 (1996) (requiring law enforcement to coordinate an investigation of child protection reports when the report alleges "a violation of a criminal statute").

8. See *id.* Law enforcement and social services often perceive their goals as incompatible insofar as one seeks to treat and the other to punish an offender. The weakness of this distinction has been noted by many commentators. See, e.g., DOUGLAS J. BESHAROV, *COMBATING CHILD ABUSE: GUIDELINES FOR COOPERATION BETWEEN LAW ENFORCEMENT AND CHILD PROTECTIVE SERVICES* 4-5 (1990). Criminal prosecutions often result in therapeutic services for an offender and child protective services for the child. The prosecution may also result in forced treatment or removal of an offender from his home which is viewed as punitive. See *id.*

9. The pattern of molesting children is so ingrained in offenders that behavioral reform does not occur without intervention. With respect to sex offenders, one commentator notes "the child molester, by and large, is compulsively addicted to sex in much the way that an alcoholic is addicted to alcohol. Under certain circumstances he is virtually unable to control his impulses and in the case of sex offenders, 'slips' may mean committing further acts of sexual assault." ERIC LEBERG, *UNDERSTANDING CHILD MOLESTERS* 145 (1997).

10. See *infra* Section III.B.2.

a child is abused by a non-caretaker.¹¹ Nor is a report required if the abuse is not a recent occurrence.¹² Moreover, if the child discloses the abuse to someone who is not a mandated reporter, there is no legal obligation to report.¹³ History teaches that in the absence of a legal obligation, many persons with knowledge of abuse will remain silent.¹⁴

This article explores and rejects the rationale for excluding numerous abused children from the protection of the statute. Additionally, this article proposes several reforms for expanding coverage of the mandated reporter law and enabling authorities to protect abused children irrespective of the identity of the perpetrator or the date of the act.

Mandated reporters need greater familiarity with the existing law and their obligations under it. Many professionals currently required to report under the law fail to do so due to their ignorance of the reporting requirement. This article presents a detailed description of Minnesota's mandated reporting statute, in an effort to help attorneys provide advice to their clients as to when to report the suspected abuse of a child.

Throughout this article, I will refer to my personal experiences with Minnesota's mandated reporting statute. I use my experiences because I share with other legal scholars the conviction that "individual experience must be considered more carefully, analyzed more critically, and elevated in importance."¹⁵

II. THE HISTORY AND EFFECTIVENESS OF MANDATED REPORTING

The concept of requiring professionals to report abuse is a relatively recent phenomenon. Indeed, the notion of government protecting abused children is itself relatively recent. Passage of the Social Security Act in the 1930s was among the first efforts to provide protection, albeit limited, for abused children.¹⁶

Child abuse was recognized as a medical diagnosis in 1962 fol-

11. See *infra* Section III.B.2.b.

12. See *infra* Section III.B.2.a.

13. See *infra* Section III.B.2.c.

14. See *infra* Section II.

15. Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1244 (1993). According to Ogletree, the "formalized, doctrinal style of argument that characterizes much contemporary legal writing can too easily elude the realities of human experience." *Id.* at 1244.

16. See Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L. Q. 141, 142 (1986).

lowing the publishing of a report completed by Dr. C. Henry Kempe and several of his colleagues entitled *The Battered Child Syndrome*.¹⁷ In 1963, researchers broadened Kempe's work to clearly include neglected children.¹⁸

Coinciding with publication of Kempe's work, the Children's Bureau of the Department of Health, Education and Welfare considered a model child abuse reporting statute which was developed in 1963.¹⁹ Two other model laws were developed in 1965 and, by 1967, all fifty states had enacted some form of a mandated reporting statute.²⁰

Initially, many of these laws required only medical professionals to report abuse, and only if the physician deemed reporting to be consistent with the effective treatment of the child.²¹ Mandated reporting laws eventually were expanded to include other professionals working with children. These later reporting laws no longer provided the professionals with the discretion not to report.²² Equally important was the expansion of the reporting laws to require reports in cases of sexual abuse and neglect.²³

The enactment of mandated reporting laws caused a flood of reports into the child protection system. In 1963, approximately 150,000 children were reported as suspected victims of abuse or neglect.²⁴ By 1972, that figure rose to 610,000.²⁵ In 1986, the number of children reported as abused increased to 2.1 million²⁶ and, by 1995, to three million.²⁷

17. See C. Henry Kempe, et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962).

18. See Vincent J. Fontana, et al., *The "Maltreatment Syndrome" in Children*, 269 NEW ENG. J. OF MED. 1389 (1963).

19. See Meriwether, *supra* note 16, at 142.

20. See *id.* at 143. Although these statutes vary in language and effect, they contain the same seven basic components: "(1) definition of reportable conditions, (2) persons required to report, (3) degree of certainty reporters must reach, (4) sanctions for failure to report, (5) immunity for good faith reports (6) abrogation of certain communication privileges, and (7) delineation of reporting procedures." *Id.*

21. See *id.* at 142.

22. See *id.* at 142-143. Even though early reporting statutes were "narrow in scope," states were able to refine their provisions as available information and professional experience increased.

23. *Id.* at 143.

24. See BESHAROV, *supra* note 8, at 2.

25. See *id.*

26. See *id.*

27. See U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 1995: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM

This increase has not, however, detracted from the quality of the reports. Indeed, between 1980 and 1986, cases in which investigators were able to substantiate abuse increased from forty-three to fifty-three percent.²⁸ Taking into account that child protection workers typically expend resources on only the most serious cases, and that a large number of cases are screened out with no investigation,²⁹ it appears that those cases investigated consist of quality reports. Even many of the unsubstantiated cases involve actual abuse which will eventually be revealed. According to one study, twenty-five percent of all unsubstantiated cases of abuse will again be reported to the system within four years.³⁰

In an analysis of data concerning the mandated reporting law, one commentator noted "the picture is of large numbers of seriously abused children, whose families and abusers have managed in past years to successfully evade detection, now finally being discovered by professionals and community members who have been sensitized to the problem."³¹ Unfortunately, "the increase in serious child abuse cases coming to the Child Protective Services' attention has not been matched by commensurate increases in staff and budget to deal with these cases."³²

Though understaffed and overworked,³³ the authorities responding to mandated reports are saving the lives of thousands of children. Since the adoption of mandated reporting laws, suspected child maltreatment deaths have decreased from two to three thousand per year to about one thousand per year.³⁴ The most vocal proponents of mandated reporting laws are adult victims who grew up in a time when child abuse was viewed exclusively as a family problem.³⁵

20-5 (1995) [hereinafter CHILD MALTREATMENT].

28. See David Finkelhor, *Is Child Abuse Overreported?*, PUB. WELFARE, Winter 1990, at 23, 24.

29. See *id.* at 25-26.

30. See *id.* at 27.

31. See *id.* at 26.

32. See *id.* at 29.

33. For a moving description of the obstacles faced by a child protection worker, see MARC PARENT, *TURNING STONES: MY DAYS AND NIGHTS WITH CHILDREN AT RISK* (1996).

34. See Douglas J. Besharov, *Reducing Unfounded Reports*, J. OF INTERPERS. VIOL., March 1991, at 112. Regrettably, the system cannot save all of the children reported. For instance, of the approximately 1,000 children who die each year as a result of maltreatment, 35-50% were already known to the system. See *id.*

35. See *Mandated Reporting: Myths and Facts*, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE (American Prosecutors Research Inst., Alexan-

There is also evidence that the most successful investigations, at least in terms of documenting and addressing the abuse, take place in response to mandated reports. For example, in 1995, sixty-six percent of the investigations in which maltreatment was substantiated were based on reports from mandated reporters in the fields of education, social services, law enforcement, and medicine.³⁶

This is not to say that mandated reporters always report when a child is the suspected victim of abuse. As late as 1986, American schoolteachers failed to report suspected abuse seventy-six percent of the time.³⁷ United States hospitals failed to report thirty-four percent of the children whose condition indicated maltreatment.³⁸ Overall, only forty percent of maltreatment cases and thirty-five percent of the most serious cases known to professionals mandated to report were in fact reported or otherwise getting into the Child Protective Services ("CPS") system.³⁹

There are several reasons why mandated reporters do not report. The ambiguity of reporting laws is one reason cited for the failure to report.⁴⁰ For example, a survey of mandated reporters in Iowa revealed difficulty in determining whether a given injury was reportable under the specific provisions of Iowa law.⁴¹ Even when the law is clear, ignorance of its provisions may prevent a report from being made. I once handled a case where a physician was frustrated that he could not report a pregnant mother's use of cocaine. To the contrary, Minnesota law required him to make such a report.⁴²

A lack of training may explain the ignorance of some mandated reporters concerning their obligations. In a 1989 survey of 480 elementary school teachers, fifty percent said they had not received any in-service training on mandated reporting. Moreover, most of the teachers were not fully aware of their schools' policies for handling child abuse cases.⁴³

dria, VA), Jul.- Aug. 1995, at 2.

36. See CHILD MALTREATMENT, *supra* note 27.

37. See BESHAROV, *supra* note 8, at 11.

38. See *id.*

39. See Finkelhor, *supra* note 28, at 25.

40. See BESHAROV, *supra* note 8, at 11.

41. See Meriwether, *supra* note 16, at 153.

42. See MINN. STAT. § 626.5561, Subd. 3 (1996).

43. See *Teachers and Child Abuse*, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE (American Prosecutors Research Inst., Alexandria, VA), Oct. 1989, at 1.

Some mandated reporters may not report suspected abuse because they view the child protection agency as being incompetent and likely to do more harm to the child through inadequate investigation.⁴⁴ Some skilled reporters recognize that social service workers must prioritize the reports received and may be able to respond to only the most serious. Recognizing this, some reporters may not call in a suspicion of abuse because they believe no action can be taken.⁴⁵ Additionally, physicians often worry about the effects of an unfounded report on their private practice.⁴⁶ In small towns, patients may be reluctant to visit a physician who has previously reported abuse, particularly if the report is viewed as frivolous.⁴⁷ Although the identity of a reporter is to be handled in confidence, small-town life is such that the identity of the reporter can often be detected.⁴⁸ Given the lack of compliance and the lack of available resources to adequately respond to all reports received by social services, the success of the reporting law in saving lives is all the more remarkable.⁴⁹

III. MINNESOTA'S MANDATED REPORTING STATUTE

A. *The Definition and Obligations of a Mandated Reporter*

A mandated reporter is "a professional or professional's delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement."⁵⁰ The practice of social services includes employee assistance counseling and guardian ad litem services.⁵¹

There is an open question as to whether secretarial or other support staff of mandated reporting agencies are mandated reporters. Although support staff are delegates of the professional,

44. See Martha Bailey, *The Failure of Physicians to Report Child Abuse*, 40 U. TORONTO FAC. L. REV. 49, 55 (1982).

45. See Gail Zellman, *Reducing Underresponding: Improving System Response to Mandated Reporters*, J. INTERPERS. VIOL., March 1991, at 116-17.

46. See Bailey, *supra* note 44, at 57.

47. See *id.*

48. See Victor I. Vieth, *A Strategy for Confronting Child Abuse in Rural Communities*, 28 PROSECUTOR 15, 16 (1994).

49. See *supra* notes 33-35 and accompanying text.

50. MINN. STAT. § 626.556, subd. 3(a)(1) (1996).

51. See MINN. STAT. § 626.556, subd. 2(j) (1996).

many are not engaged "in the practice" of the profession and thus may be excluded from the statute.⁵² Agencies seeking to ensure their department complies with both the letter and spirit of the statute are well-advised to have all employees receive mandated reporter training. It would be unfortunate if the necessity of a report depended on whether a parent discloses abuse to the physician's secretary or to the physician.

Members of the clergy are also mandated reporters provided they receive the information of abuse while engaged in ministerial duties and the information was not in a confessional setting or is otherwise privileged.⁵³ If, for instance, a pastor is engaged in the ministerial duty of visiting the sick in the hospital and a child or other patient reveals an act of abuse, a report is required as long as the revelation does not constitute a confession.

Clergy and other mandated reporters are required to report to the police or the social service agency any time "a person knows or has a reason to believe" a child has been physically abused, sexually abused, or neglected.⁵⁴ An oral report must be made "immediately" and followed up with a written report.⁵⁵ In many cases, speed is of the essence. Authorities who must decide whether a child should be allowed to get on the bus after school and go home to a suspected perpetrator will be able to make an informed decision if the report is received in the morning, as opposed to the afternoon.

A common mistake made by some educators and other professionals in large organizations is to believe that they have complied with the statute once they report the information to a superior who promises to notify the authorities. The law requires the teacher or

52. See *id.*

53. MINN. STAT. § 626.556, subd 3(a)(2) (1996); MINN. STAT. § 595.02, subd. 1(c) (1996). Some have debated whether or not states can compel members of the clergy to disclose privileged communications without violating the free exercise provision of the First Amendment. See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987). Even if members of the clergy can be lawfully required to disclose confessions, it is doubtful many would. After all, a sincere belief that God forbids disclosure will likely take precedent over man's belief that a report must be made. Even so, clergy who believe disclosure is not permissible under church doctrine may nonetheless have the means to protect the child. For instance, a priest can require a molester to turn himself over to the authorities as a condition of absolution.

54. MINN. STAT. § 626.556, subd. 3 (1996).

55. See MINN. STAT. § 626.556, subd. 3(a)(2) (1996).

other individual who received the information suggesting abuse to make the report.⁵⁶ This is logical because the teacher has direct knowledge of how the information was obtained and is better equipped to answer the intake worker's questions.

Another open question is whether a mandated reporter remains a mandated reporter after working hours. For instance, if a physician goes home and hears a neighbor child being abused, is the physician required to make a report? Although the statute does not specifically address this question, there is a strong case for answering the question affirmatively. First, the legislature requires clergy to report only if the information is received while engaged in ministerial duties.⁵⁷ No similar exception is made for social workers, law enforcement officers, doctors, or other mandated reporters.⁵⁸ Accordingly, it may be that mandated reporters, other than members of the clergy, are expected to report abuse even if they acquire the information while off duty.⁵⁹ Second, the legislative purpose of the statute is to "protect children."⁶⁰ It would be inconsistent with this purpose to hold that mandated reporters must report abuse only if it comes to their attention during working hours. On the other hand, failure to report subjects the mandated reporter to potential civil and criminal liability.⁶¹ But, given that criminal statutes are strictly construed and vagueness may call into question the constitutionality of the law,⁶² a court may be reluctant to hold a reporter criminally culpable for failing to report information received during non-working hours.

56. See MINN. STAT. § 626.556, subd. 3(a)(2) (1996). The mandated reporting law obligates a "person" who knows or has reason to believe abuse has taken place to make the report. *Id.*

57. See MINN. STAT. § 626.556, subd. 3(a)(2) (1996).

58. See *id.*

59. Some states specifically limit a reporter's obligation to report information received in their official capacities. See, e.g., CAL. PENAL CODE § 11166(a) (West Supp. 1997); D.C. CODE ANN. § 2-1352(a) (1994); HAW. REV. STAT. ANN. § 350-1.1(a) (Michie 1981 & Supp. 1994); 325 ILL. COMP. STAT. ANN. 5/4 (West Supp. 1997); KY. REV. STAT. ANN. § 620.030 (Michie 1996); MD. CODE ANN. FAM. LAW. § 5-704(a) (1991); MASS. GEN. LAWS ANN. 119, § 51A (1993); N.Y. SOC. SERV. LAW § 413 (McKinney 1996); N.D. CENT. CODE ANN. § 50-25.1-03 (Michie Supp. 1997); S.C. CODE ANN. § 20-7-510 (Law Co-op. 1996).

60. MINN. STAT. § 626.556, subd. 1 (1996). The purpose of this legislation is to "strengthen the family and make the home, school and community safe for children by providing responsible child care in all settings." *Id.*

61. See MINN. STAT. § 626.556, subd. 6 (1996). An individual required to report, but who fails to do so, is guilty of a misdemeanor. *Id.*

62. See *State v. Orsello*, 554 N.W.2d 70, 75 (Minn.1996) (determining strict statutory construction required proof of specific intent).

Whether or not a report is required, the morally sound choice is to pick up the phone. In Minnesota, voluntary and mandated reporters acting in good faith are protected from all civil and criminal liability.⁶³ More importantly, reporters have a trouble-free conscience knowing they did what they could to address abusive practices. In the words of Erik Erickson, “[s]omeday, maybe, there will exist a well-reasoned, well-informed, and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child’s spirit.”⁶⁴ Every day, in every state, voluntary and mandated reporters keep this hope alive.

B. The Scope of the Minnesota Law

A mandated reporter is required to report when she has reason to believe a child has been sexually abused, physically abused, or neglected.⁶⁵ Unfortunately, these terms are not as easily understood as they may appear on the surface.

1. Abused Children Protected by the Statute

a. Sexual Abuse

At a minimum, sexual abuse involves touching the intimate parts, or the clothing covering the intimate parts⁶⁶ of a child for the sexual or aggressive gratification of the perpetrator.⁶⁷ Obviously, more extreme touching is also sexual abuse. Sexual abuse also includes the use of a child in prostitution or obscene works.⁶⁸ However, bona fide hugs, baths, diaper changes, and medical care are not touches with the aim of aggressive or sexual gratification and are not sexual abuse.⁶⁹

63. See MINN. STAT. § 626.556, subd. 4 (1996). A person is not protected for “failing to make a required report, or for committing neglect, physical abuse, or sexual abuse of a child.” *Id.*

64. Vieth, *supra* note 6, at 727.

65. See MINN. STAT. § 626.556, subd. 3(a) (1996).

66. See MINN. STAT. § 609.341, subd. 5 (1996) (defining intimate parts as including the primary genital area, groin, inner thigh, buttocks or breasts).

67. See MINN. STAT. § 626.556, subd. 2(a) (1996). “Sexual abuse means the subjection of a child by a person responsible for the child’s care by a person who has a significant relationship to the child.” *Id.*

68. See *id.* A minor may not be used in sexual performance or prostitution. See MINN. STAT. § 617.246, subd. 2 (1996); MINN. STAT. § 609.324, subd. 1(a) (1996).

69. See *id.*

b. Physical Abuse

A child must be reported as a possible victim of physical abuse if there is reason to believe the child has suffered an inflicted physical injury, mental injury, or threatened injury.⁷⁰ The precise meaning of physical, mental, and threatened injury is, regrettably, elusive.

1. *Physical Injury.* The statute does not define this term. In construing a statute, however, words are to be interpreted "according to their common and approved usage."⁷¹ The dictionary definition of injury is "a wound or other specific damage."⁷² Thus, anytime a mandated reporter suspects a child has suffered non-accidental bruises, scratches, or other trauma unrelated to legitimate medical or other care, a report is required. A reporter should be wary of caretaker conduct such as shaking a baby. This conduct may not produce external signs of injury, but can cause internal damage leading to death.⁷³ Punching a child in the stomach is another example of conduct likely to cause an internal bruise or other injury while not necessarily resulting in exterior signs of abuse.⁷⁴

70. See MINN. STAT. § 626.556, subd. 2(d) (1996). "Physical abuse" is defined as "any physical or mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child for other than accidental means. . . ." *Id.*

71. MINN. STAT. § 645.08 (1996).

72. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 944 (1983).

73. See generally, ANGELO P. GIARDINO, ET AL., A PRACTICAL GUIDE TO THE EVALUATION OF CHILD PHYSICAL ABUSE AND NEGLECT 156-160 (1997).

74. In one of her novels, fiction writer Nancy Taylor Rosenberg describes a child abuser adept at hurting a child without leaving visible marks:

His stepfather met his challenge and punched him right in the face with his fist. Then he pulled back and punched him several more times, connecting with his cheek, his forehead, the strength of his blows almost knocking the boy out of the chair. Suddenly he stopped and looked at Josh. He knew just how far he could go. He didn't want the school reporting Josh's injuries to the authorities. He had other ways to punish him. Ways that didn't show.

* * *

He forced Josh to sit at the table and eat the TV dinner he'd made for himself. 'Since you're such a hot shot, too good to make your dad something to eat, I want you to eat the whole thing, even the fucking tray. . . (e)at the foil, the tray, the whole damn thing. . .

NANCY TAYLOR ROSENBERG, INTEREST OF JUSTICE 32 (1994). For a non-fiction account of an abuser's creative hiding of child abuse injuries, see Mary Bryk & Patricia T. Siegel, *My Mother Caused My Illness: The Story of a Survivor of Munchausen by Proxy Syndrome*, 100 PEDIATRICS 1 (July 1997).

The statute excludes traditional acts of corporal punishment from its definition of child abuse, provided the punishment does not cause internal or external damage. Thus, swatting a child's buttocks a limited number of times with the sole objective of inflicting pain or placing a child in fear of pain as a means of discipline does not appear to be a situation calling for a mandated report. This is consistent with the laws in other states excluding reasonable corporal punishment from the mandated reporting law.⁷⁵

Spanking a child, however, is not necessarily a lawful act in Minnesota. Indeed, Minnesota may be the only state to deem spanking a criminal assault. Minnesota law, at one time, permitted parents to use reasonable force or *violence* on their children.⁷⁶ However, this statute was repealed and replaced with statutory language enabling parents to use "force" but not "violence" on children. The Minnesota legislature deemed the parental use of reasonable force a defense to a charge of false imprisonment, neglect, failure to report maltreatment of minors and contributing to a child's need for protection.⁷⁷ Accordingly, a parent in Minnesota who grounds a child for a week, or sends a child to bed without dessert, should not be charged with false imprisonment or neglect. On the other hand, a parent who chooses to hit a child will be afforded no protection under the criminal code. Since spanking is an attempt to inflict pain, or place a child in fear of pain, in an effort to reform behavior, every act of spanking would appear to constitute at least fifth degree assault.⁷⁸

75. See e.g. ALA. CODE ANN. § 26-14-3 (Michie Supp. 1996); ARK. CODE ANN. § 12-12-503 4(B) (Michie 1995); CAL PENAL CODE § 11165.4 (West Supp. 1997); COLO. REV. STAT. ANN. § 19-1-103(1)(a) and 19-1-103(I) (West Supp. 1997); 325 ILL. COMP. STAT. ANN. 5/3(e) (West Supp. 1997); MONT. CODE ANN. § 41-3-102 (1995); N.D. CENT. CODE § 50-25.1-02 (4)(a) (1995).

76. See MINN. STAT. § 619.40 (1961) (emphasis added).

77. See MINN. STAT. § 609.379 (1996).

78. See MINN. STAT. § 609.224 (1996). It should be noted that by removing from parents the "right" to "hit" their children, Minnesota's criminal code enables local courts to avoid the pitfalls of other states which have endured endless and often silly litigation over the definition of what constitutes a reasonable blow to a child's body. See, e.g., *State v. Crouser*, 911 P.2d 725, 725 (Haw. 1996). In *Crouser*, the caretaker struck a teenage girl on each side of her face, threw her onto a bed, pulled down her pants and underwear and beat her for 30 minutes with his hand and also a plastic bat which eventually broke because of the force used. *Id.* at 728. The child had difficulty sitting and endured pain for approximately two weeks. *Id.* Although the defendant was convicted of child abuse, the Hawaii Supreme Court actually had to entertain a motion that the beating was reasonable. See *id.* at 731.

Despite the fact that spanking a child meets Minnesota's definition of a criminal assault, most parents will inflict and most children will receive corporal punishment.⁷⁹ The drafters of Minnesota's mandated reporting law apparently recognized this reality and drafted language to require reports only in instances where the physical assault produces injury. Since Minnesota prosecutors have historically exercised their sound discretion and have not pursued cases of mild corporal punishment,⁸⁰ it is unlikely that a criminal investigation would result in criminal charges. Indeed, even the proponents of Minnesota's abolition of a parent's right to use violence against a child argue against prosecuting parents for the use of mild forms of corporal punishment.⁸¹

2. *Mental Injury.* The statute defines a mental injury as "an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in the child's ability to function within a normal range of performance and behavior with due regard to the child's culture."⁸² This language parallels the definition of mental injury used by clinicians.⁸³

Researchers Garbarino, Guttman, and Seeley identify five types of emotional maltreatment.⁸⁴ First, a parent emotionally abuses a child when the child is rejected.⁸⁵ Rejection takes place when the

79. See Victor I. Vieth, *Corporal Punishment in the United States: A Call for a New Approach to the Prosecution of Disciplinarians*, 15 J. JUVENILE L. 22, 23 (1994) (noting the use of corporal punishment and the use of reasonable force on children by disciplinarian parents is permitted in most states and is widespread throughout the United States).

80. See *id.* at 46. There are no reported cases in Minnesota of fifth degree assaults to children involving parents as a result of routine spanking.

81. See *id.* at 47-48. Commentators state "most parents administering corporal punishment do so out of love and a sincere desire to 'train a child in the way he or she should go.'" *Id.*

82. MINN. STAT. § 626.556, subd. 2(k) (1996).

83. In a 1978 workshop to the National Institute on Health, two commentators, Lourie and Stefano, proposed the following clinical definition of mental injury: "an injury to the intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in his or her ability to function within his or her normal range of performance and behavior with due regard to his or her culture." JAMES GARBARINO, ET AL., *THE PSYCHOLOGICALLY BATTERED CHILD* 2-3 (1986). This definition of mental injury further parallels a portion of Minnesota's Child in Need of Protection or Services (CHIPS) statute which defines emotional maltreatment as "the consistent, deliberate infliction of mental harm on a child . . . that has an observable, sustained, and adverse effect on the child's physical, mental or emotional development." MINN. STAT. § 260.015, subd. 5a (1996).

84. See GARBARINO, ET AL., *supra* note 83, at 8.

85. See *id.* at 2.

parent “refuses to acknowledge the child’s worth and the legitimacy of the child’s needs.”⁸⁶ Second, a child is emotionally maltreated when isolated. Isolation occurs when the child is cut off “from normal social experiences” such as the development of friendships.⁸⁷ Third, a child is emotionally maltreated when terrorized. Terrorism occurs when “the adult verbally assaults the child, creates a climate of fear, bullies and frightens the child, and makes the child believe that the world is capricious and hostile.”⁸⁸ Fourth, a child is emotionally maltreated when ignored. This occurs when “the adult deprives the child of essential stimulation and responsiveness, stifling emotional growth and intellectual development.”⁸⁹ Finally, a child is emotionally maltreated when the child is corrupted. This occurs when the parent “stimulates the child to engage in destructive antisocial behavior, reinforces that deviance, and makes the child unfit for normal social experience.”⁹⁰

Preschool and school-age children subjected to emotional maltreatment perform at lower levels on measures of ability, academic achievement and social competency.⁹¹ Although some conclude that psychological maltreatment is more common than other types of abuse, emotional abuse receives “little pedagogical, psychological, or legal attention.”⁹²

In my experience as a prosecutor,⁹³ cases of emotional maltreatment crossed my desk sporadically, and when they did, they were usually cases involving physical injury to the victim. Still, I recall one case where a caretaker fastened derogatory labels to a child as a means of punishment through humiliation. In many other cases, parents threatened to maim and kill their child. In another instance, a caretaker chased his child victims with a chainsaw as a means of terrorizing them. At times, a parent would iso-

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 2-3.

90. *Id.*

91. See Irwin A. Hyman, *Corporal Punishment, Psychological Maltreatment, Violence, and Punitiveness in America: Research, Advocacy, and Public Policy*, 4 APPLIED & PREVENTIVE PSYCHOL. 113, 121 (1995) (indicating teachers’ ratings demonstrate maltreated children display an increase in behavioral problems and poor interpersonal competencies).

92. *Id.* at 120 (citing the results of studies conducted by Pokalo and Hyman in 1993 and Sarno in 1992).

93. I worked as a prosecutor from 1988-1997, serving the rural Minnesota counties of Watonwan and Cottonwood Counties.

late one of several children and blame that child for all family woes. Cases such as these all fit within the definition of emotional maltreatment and warrant legal action.

Police officers tell me that a case of emotional maltreatment is not a crime and is exclusively within the jurisdiction of the social service agency. This is blatantly untrue. Emotional maltreatment is a basis for granting a CHIPs petition because a child is in need of protection or services.⁹⁴ Anyone who contributes to a child's need for protection or services has committed a misdemeanor.⁹⁵ Some acts of emotional maltreatment, such as the incident of an adult chasing a child with a chainsaw, also constitute assaults.⁹⁶

3. *Threatened Injury*. This type of physical abuse is defined as "a statement, overt act, condition, or status that represents a substantial risk of physical or sexual abuse or mental injury."⁹⁷ There are numerous documented cases where striking a child's buttocks has caused serious injury.⁹⁸ The traditional act of swatting a child's bottom is, however, generally considered the safest type of assault provided the genitals are protected and the skin is not broken.⁹⁹ Accordingly, a parent's threat to spank a child is likely not a threat which represents a "substantial" risk of physical harm. A threat to shoot, stab, scald, or otherwise disfigure a child would be examples of threats clearly meeting the definition of a substantial risk of harm and thus obligating a mandated reporter to act.

Minnesota's definition of "threatened injury" parallels language proposed in 1975 by Professor Michael Wald.¹⁰⁰ The requirement that the threatened injury pose a "substantial risk"¹⁰¹ of

94. See MINN. STAT. § 260.015, subd. 5 (1996); see also MINN. STAT. § 260.015, subd. 2a, 5a (1996) (defining delinquent child and child in need of protection).

95. See *id.* A misdemeanor is punishable by up to 90 days in jail, a \$700 dollar fine, or both.

96. See MINN. STAT. § 609.02, subd. 10 (1996). An assault is defined to include placing the victim in fear of bodily harm. See MINN. STAT. § 224 (1996).

97. MINN. STAT. § 626.556, subd. 2(1) (1996) (defining "threatened injury").

98. See Vieth, *supra* note 79, at 33-34. Possible injuries include: blistering, welts, blood clots, and broken blood vessels. See *id.* at 33. Further, paddling may result in permanent damage to the buttocks. See *id.*

99. See *id.* (citing David P. Freidman & Alma S. Freidman, *Pediatric Considerations in the Use of Corporal Punishment in the Schools*, CORPORAL PUNISHMENT IN AMERICAN EDUCATION 337, 339 (Irwin A. Hyman, et al. eds., 1979)).

100. See Meriwether, *supra* note 16, at 155 (citing Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN L. REV. 985, 1014 (1975)).

101. See *id.* "Substantial risk" is defined as any situation where a child may be a risk of "imminent death, disfigurement, or impairment of bodily functions as a

harm is designed to meet the concern of critics who believe that a mere requirement to report a threatened injury would "permit discriminatory interpretations of reportable conditions" and would result in an "increased possibility of unwarranted intrusion into the privacy of the family."¹⁰²

c. Neglect

The mandated reporting statute defines "neglect" as a caretaker's failure to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so, failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical health or mental health when reasonably able to do so, or failure to take steps to ensure that a child is educated in accordance with state law.¹⁰³ The statute further defines neglect to include prenatal exposure to controlled substances¹⁰⁴ but excludes reliance on spiritual means in lieu of medical care from the neglect definition.¹⁰⁵ One difficulty in defin-

result of conditions created by a parent, or the failure of a parent to adequately supervise him." *Id.*

102. *Id.* at 154-155.

103. MINN. STAT. § 626.556, subd. 2(c) (1996).

104. *See id.* A controlled substance for purposes of the mandated reporting law is cocaine, heroine, phencyclidine, methamphetamine, and amphetamine, or their derivatives. *See* MINN. STAT. § 253B.02 (1996). This definition excludes alcohol, which can produce Fetal Alcohol Syndrome, the leading cause of mental retardation and the only preventable one. *See* DIANE MALBIN, FETAL ALCOHOL SYNDROME, FETAL ALCOHOL EFFECTS: STRATEGIES FOR PROFESSIONALS 4 (1993).

105. *See* MINN. STAT. § 253B.02, subd. 2 (1996). Although Minnesota is one of several states which allow parents to deprive children of health care under the guise of spiritual healing, numerous organizations condemn the practice. These organizations include the American Medical Association, the American Academy of Pediatrics, the National Committee for Prevention of Child Abuse, and the National District Attorneys Association. The latter organization's policy position reads:

WHEREAS, all children are entitled to equal access to all available health care, and

WHEREAS, all parents shall be held to the same standard of care in providing for their children, and that all parents shall enjoy both equal protection and equal responsibilities under law, regardless of their religious beliefs,

BE IT THEREFORE RESOLVED that the National District Attorneys Association shall join with other child advocacy organizations to support legislation to repeal exemptions from prosecution for child abuse and neglect.

ing neglect is that many cases involve families "living at or near the poverty level" who simply cannot afford ideal clothing, shelter and food.¹⁰⁶ Since state intervention is unlikely to alleviate poverty, neglect statutes attempt to raise the standard by defining neglect as the failure to provide "adequate" food, clothing and shelter.

Minnesota's statute reflects this philosophy by protecting children only if they are denied "necessary" items and even then only when the parent is "reasonably able to do so."¹⁰⁷ Accordingly, even if a family is living on the street, a clear denial of "necessary" shelter, a neglect report would not be required if the parents were so poor they were not "reasonably able" to provide shelter.¹⁰⁸ While this standard avoids characterizing poor parents as neglectful, it does little to bring into the system children whose survival is in jeopardy. Fortunately, many reporters, even if they are aware of this distinction, are unlikely to know if a parent has the financial means to provide a child with the necessities of life. In these instances, a reporter still has a "reason to believe"¹⁰⁹ the child is neglected and a report is required. To the extent government programs such as AFDC, medical assistance, and public housing are available, it can be argued that each parent is reasonably able to provide the child with the necessities of life.

Once the hurdle of poverty is cleared, many children falling within the definition of neglect are easy to spot. Children who are malnourished, who are deprived of necessary medical care, who are improperly clothed for the climate, and who reside in uninhabitable dwellings are clearly neglected. Unfortunately, some broad categories of neglected children who likewise fall within the definition of neglect are often overlooked by mandated reporters. The broadest of these categories is children living in homes where they are exposed to domestic violence. It cannot be seriously disputed

NDAA Position on Religious Exemptions, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE (American Prosecutors Research Inst., Alexandria, VA) Sept. 1991, at 1.

106. See Meriwether, *supra* note 16, at 158. According to Meriwether, many of the current neglect cases involve families living at or near the poverty level. See *id.* Further, many of the "inadequacies" are the direct result of financial constraints. See *id.*

107. MINN. STAT. § 626.556, subd. 2(c) (1996) (providing that "neglect means failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so . . .").

108. See MINN. STAT. § 626.556, subd. 2(c) (1996).

109. MINN. STAT. § 626.556, subd. 3(a) (1996).

that children residing in homes where mother and father assault each other are being exposed to "conditions or actions which imminently and seriously endanger the child's physical or mental health."¹¹⁰ In terms of their physical safety, these children are at greater risk of physical abuse.¹¹¹ Although not physically harmed themselves, children exposed to domestic violence have "higher rates of serious health problems, suicide attempts, criminal behavior, drug dependency, dropping out of school, and early adult unemployment."¹¹² Ninety percent of the men in Minnesota prisons grew up in homes where fathers assaulted mothers.¹¹³

The fact that children exposed to domestic violence are neglected is further supported by Minnesota's CHIPS statute which provides that a child is in need of protection or services if the child's environment is "such as to be injurious or dangerous to the child or others. An injurious or dangerous environment may include, but is not limited to, the exposure of a child to criminal activity in the child's home."¹¹⁴ Assault is a crime. Accordingly, parents who hit one another are exposing their children to criminal activity and, as a result, are establishing that their children are in need of protection or services under Minnesota's CHIPS statute.

2. *Abused Children Not Protected by the Statute*

Although the mandated reporting law has brought many abused children into the system, some abused children continue to fall through the cracks. Depending on the date of the abuse and the identity of the reporter, a child may not be protected under the statute.

110. MINN. STAT. § 626.556, subd. 2(c) (1996).

111. See *Call for Collaboration*, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE (American Prosecutors Research Inst., Alexandria, VA), Oct. 1995. See also Maura O'Keefe, *Predictors of Child Abuse in Maritally Violent Families*, 10 J. OF INTERPERS. VIOL. 3 (1995).

112. Mary E. Asmus, et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 121 (1991) (citing James Ptacek, *The Clinical Literature on Men Who Batter: A Review and Critique: Family Abuse and Its Consequences*, NEW DIRECTIONS IN RESEARCH 149, 149-162 (G. Hotaling, ed., 1988); Jane Pfoots, *Violent Families and Coping Responses of Abused Wives*, 56 CHILD WELFARE 101, 101-11 (1978)).

113. See *id.* at 121.

114. MINN. STAT. § 260.015, subd. 2a(9) (1996).

a. *Children Abused Over Three Years Ago*

A mandated reporter is required to report the physical abuse, sexual abuse, or neglect of the child only if the offending conduct occurred within the preceding three years.¹¹⁵ It may make sense that a child who lived in a rodent-infested dwelling six years ago, now living in acceptable conditions should not be the subject of a report. After all, the conditions have been corrected and there is no need for intervention. Indeed, there likely can be no intervention since the neglect portion of the CHIPS statute provides for children presently being medically neglected or without other necessary care.¹¹⁶

In cases of physical or sexual abuse, however, the purpose behind the three-year limitation is less clear. I have seen cases where children limit the extent of abuse, claiming it happened only once several years ago. The difficulty children have in fully disclosing abuse is well-documented.¹¹⁷ Accordingly, a physician or psychologist may justifiably suspect the abuse is more prevalent and ongoing. Even so, these professionals may be reluctant to step outside the boundaries of a confidential relationship with a patient or client when a mandated report is not called for based on the child's actual statement.

The provision that abuse be reported only if occurring within the past three years is inconsistent with the CHIPS statute. This law declares a "child in need of protection or services" if the child "has been a victim of physical or sexual abuse" without limitations on when the abuse occurred.¹¹⁸ Unlike a case of neglect, there is no suggestion that the abuse must be within the last three years.

Even if social services chooses not to file a CHIPS petition in a case of abuse occurring several years ago, law enforcement agencies can still act.¹¹⁹ In child sexual abuse cases, for example, a charge can be filed within nine years from the date of the offense, or if not reported during that time, within three years from the

115. See MINN. STAT. § 626.556, subd. 2(c) (1996).

116. The "CHIPS" child includes one who "is" without necessary food, clothing or shelter. See MINN. STAT. § 260.015, subd. 2a(3) (1996). It appears that a child who "has been," but is no longer, deprived of these necessities would not be a child in need or protection or services.

117. See Roland C. Summit, M.D., *The Child Sexual Abuse Accommodation Syndrome*, J. OF CHILD SEXUAL ABUSE 41 (Apr. 1992).

118. MINN. STAT. § 260.015, subd. 2a(2)(i) (1996).

119. See MINN. STAT. § 260.015 (1996).

date the case is reported to the police.¹²⁰

Other jurisdictions do not limit child abuse reports based on the date abuse occurred.¹²¹ Given that the legislature, in enacting the CHIPS law, recognized that physically and sexually abused children may be in need of protection or services even if the act occurred more than three years ago, perhaps the three-year limitation in the mandated reporting law is premised on a belief that older reports are more difficult to prove and are less likely to involve imminent danger. Many experts contend, however, that without intervention, child abusers will re-offend.¹²² While it may be true that older cases may suffer from a lack of evidence, the fact that the incident is several years old does not eliminate the danger to children who remain in contact with the perpetrator. Injuries heal, memories fade, and crime scenes are altered with the passage of time. This does not mean, however, that older cases should be routinely excluded from the system. Indeed, some of these cases may improve with age. For instance, the child victim may have matured and become a much stronger witness who is more difficult to intimidate.¹²³ The non-abusing parent may have separated from the perpetrator and become willing to support the child's statement of abuse. X-rays and other medical documentation of older injuries may still exist. There is always the possibility that a skilled investigator will obtain incriminating statements from the suspect.¹²⁴

120. See MINN. STAT. § 628.26 (1996).

121. For an overview of the mandated reporting statutes for all 50 states, see NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT STATUTES, REPORTING LAWS: DEFINITIONS OF CHILD ABUSE AND NEGLECT (Series No. 1, 1996) [hereinafter CHILD ABUSE AND NEGLECT STATUTES].

122. See Mike Tharp, *Tracking Sexual Impulses*, U.S. News and World Report, July 7, 1997 (discussing program in Maricopa County, Arizona to monitor sex offenders based on the premise "that sex offenders cannot be rehabilitated, they can merely be prevented from acting again").

123. For a discussion of the prospect of witness intimidation in cases of child abuse, see Victor I. Vieth, *Broken Promises: A Call for Witness Tampering Sanctions in Cases of Child and Domestic Abuse*, 18 HAMLINE L. REV. 181 (1994).

124. See Justin Gillis, *Nobel Laureate is Sent to Jail; Tape Helped to Decide Fate in Sex Abuse Case*, WASH. POST, April 30, 1997, at A1 (describing the monitoring by investigators of a phone conversation between a child molester and one of his victims); see also NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE (2d ed. 1993) 100-103 (discussing interrogation of child abusers).

b. Children Abused by a Non-Caretaker

A case of sexual abuse must be reported only if the perpetrator is responsible for the child's care or in a position of authority.¹²⁵ Persons responsible for a child's care include parents, guardians, teachers, baby-sitters, and coaches.¹²⁶ Persons in a position of authority are those responsible for the health, welfare or supervision of the child *at the time of the act*.¹²⁷ This definition does not cover child molesters who may be neighbors, relatives, mom's boyfriend, dad's girlfriend, or anyone else who, at the time of the molestation, did not have responsibility for the care of the child. I have handled cases where a mother brings home a man she recently met. The man spends the night and, during the evening, molests the child.

Although most child abusers are parents, approximately eighteen percent of perpetrators are relatives or other persons outside the immediate family unit.¹²⁸ Given that approximately three million children are reported as abuse victims each year, and approximately one million of these are confirmed victims, it is clear that by excluding eighteen percent of abused children from its provisions, mandated reporting laws such as Minnesota's leave unprotected thousands of hurting children. This result is inconsistent with the legislative policy behind the law which is to "protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse."¹²⁹ Although some states likewise restrict mandated reports to those in which the perpetrator is a caretaker or other person in authority, some states require abuse to be reported irrespective of the identity of the reporter.¹³⁰

Some mandated reporters may see benefits in the legislature's decision to shield some child abusers from being brought to the attention of the authorities. For instance, physicians may not wish to report an act of statutory rape between a fifteen-year-old girl and her nineteen-year-old boyfriend. The fear is that the child will no longer seek birth control or medical care if she knows her boyfriend will be reported. On the other hand, if the report results in a criminal prosecution of the perpetrator and the prosecution ends

125. See MINN. STAT. § 626.556, subd. 2(a) (1996).

126. See *id.*, subd. 2(b).

127. See MINN. STAT. § 609.341, subd. 10 (1996) (emphasis added).

128. See CHILD MALTREATMENT, *supra* note 27.

129. MINN. STAT. § 626.556, subd. 1 (1996).

130. See *infra* notes 179-80 and accompanying text.

the ongoing sexual relationship, the need for birth control and the risk of pregnancy or STDs may be reduced or eliminated.

If Minnesota chose to give health care professionals the option of not reporting select cases of statutory rape, this would nonetheless free physicians to report most cases of sexual abuse occurring outside the immediate family. Wisconsin, for instance, allows health care providers not to report a case of sexual abuse if the child is receiving health care services.¹³¹ On the other hand, Wisconsin requires a report if the abuser is a caregiver, the child was unconscious, the child was being exploited by another participant in the sexual contact, or the child could not give meaningful consent because of her state of immaturity, mental illness, or mental deficiency.¹³²

Some psychiatrists worry that *any* obligation to report child abuse impairs their ability to treat abusers.¹³³ Others argue that "[o]ffenders must take responsibility for their own thoughts, feelings and actions. These goals are not met when a therapist gets caught up in helping offenders maintain secrecy. In treating sex offenders, confidentiality does not protect the community."¹³⁴

The Children's Bureau offers the following rationale for not reporting cases of abuse when the perpetrator is not a caretaker and does not have authority over the child:

When children are abused or mistreated by other persons, their parents or those responsible for their care and protection are expected to take whatever action may be indicated under the law. But when the family or home environment itself is unsafe for children, when it has produced their injuries and threatened them with more, the duty of the state is to pro-

131. See WIS. STAT. ANN. § 48.981(2)(2M)(c) (West Supp. 1997).

132. See WIS. STAT. ANN. § 48.891(2)(2M)(d)-(e) (West Supp. 1997).

133. See *Treating Sex Offenders: Reporting vs. Confidentiality*, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE (American Prosecutors Research Institute, Alexandria, VA), May 1991, at 1.

134. *Id.* (citing the guide by MICHAEL O'CONNELL, ET AL., WORKING WITH SEX OFFENDERS: GUIDELINES FOR THERAPIST SELECTION (1990)). The traditional agreement of confidentiality works to the detriment of the sex offender's ability to solve problems, as well as increases the risk to potential victims. See LEBERG, *supra* note 9, at 144. This is because the therapist needs to talk freely with anyone in the offender's life who may be able to assist in monitoring and controlling the offender's behavior. See *id.* at 144-145.

vide protective services.¹³⁵

There are several fallacies to this argument. First, it presumes that all parents have the foresight to recognize and access needed services for an abused child. The harm suffered by a child abuse victim is not solely dependent on the identity of the perpetrator. Second, keeping these cases out of the system may encourage the victim to suffer in silence. A parent may be more interested in protecting the family name than in protecting the child. Many children obtain a feeling of empowerment when their abuser is prosecuted successfully and, as a result, benefit psychologically.¹³⁶ Third, most child abusers do not offend only once.¹³⁷ Accordingly, the failure to report cases of abuse based on the identity of the perpetrator may make the state an unwitting accomplice to the abuse of other children.

Although a concerned citizen can make a voluntary report of cases not falling within the definition of abuse, the mandated reporting statute in practice may prevent such reports. This can come about, for instance, when a child is sexually abused by a neighbor. A physician or other mandated reporter may want to report the abuse out of concern the perpetrator may offend again. Unfortunately, the identity of the perpetrator excludes the case from the definition of sexual abuse.

The reporter may be able to report the case as one of neglect if there is a basis to believe the parents did not properly supervise or otherwise protect the child. However, if the parent of the child has taken all necessary steps to ensure the victim will have no further contact with the perpetrator, it may be difficult to suggest the case is one of neglect. The parent may very well instruct the physician not to disclose the abuse to the system. Under these circumstances, a physician may not be able to report without violating

135. See Meriwether, *supra* note 16, at 155.

136. According to a recent study, most sexually abused children react favorably to intervention by the child protection system. The abused children in the study "overwhelmingly viewed the system as positive, with 72 percent indicating that it was more positive than negative. This finding indicates that most system interventions do serve to support sexually abused children." Jim Henry, *System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure*, 12 J. INTERPERS. VIOL. 499, 510 (1997).

137. In recognition of this fact, the United States Supreme Court has upheld the civil commitment of a child molester who acknowledged that when he "gets stressed out" he "can't control his urges." *Kansas v. Hendricks*, No. 95-1649; 1997 U.S. LEXIS 3999, at *16 (June 23, 1997).

doctor-patient privileges and, consequently, the child abuser may remain at large.¹³⁸

In a case of physical abuse, a report is mandated only if "inflicted by a person responsible for the child's care."¹³⁹ This definition excludes all perpetrators outside the family unit or those who do not otherwise have a caretaking role.

In many cases of physical abuse, the identity of perpetrator is unclear. The statute requires a report when the injury cannot reasonably be explained by the child's history.¹⁴⁰ This scenario, however, is most applicable to a parental abuser who gives a fictitious account for her child's injury. It may not apply to a situation where a child clearly articulates the perpetrator to be a non-caretaker and the parent has taken steps to prevent future harm. In such a scenario, there does not appear to be an issue of ongoing neglect. Since the identity of the perpetrator takes the case outside the realm of abuse as defined in the statute, the wishes of the family not to report may have to be respected.

c. Children Disclosing Abuse to an Adult Not Mandated to Report

To the extent doctors, teachers, day care providers, and other mandated reporters are in regular contact with children, it is logical to require them to report abuse. Unfortunately, this conditions a child's protection on the identity of who becomes aware of the abuse. If a child's abuse is known only to a neighbor, relative or someone otherwise not mandated to report, the information is less likely to be reported and the child is more likely to endure additional abuse. Indeed, many of the most vulnerable children do not regularly come into contact with a mandated reporter. "The most serious injuries and the greatest number of deaths from the battered child syndrome are inflicted upon children under three years of age who have little opportunity to maintain contact or visibility with others outside the home."¹⁴¹

138. As a frightening example of the type of abuse which may go unreported, one commentator offers the scenario of a patient who tells a psychiatrist he molested an unknown child in the park. See FRED KARASOV & CAROL LANSING, MINNESOTA COUNTY ATTORNEYS ASSOCIATION, MANUAL FOR PROSECUTION OF CHILD ABUSE 9 (1995).

139. MINN. STAT. § 626.556, subd. 2(d) (1996).

140. See *id.*

141. Susan A. Collier, Comment, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC. L. J. 189, 190 (1983).

There are numerous cases in which non-mandated reporters were aware of obvious abuse and chose not to act.¹⁴² In one case, a neighbor and grandfather offered to take an injured child to the hospital. The child suffered from a swollen head three times its normal size, eyes blackened and swollen shut, and a patch of missing hair.¹⁴³ When the mother declined their offers of assistance, no report was made.¹⁴⁴

Absent any intervention, abuse can be expected to escalate.¹⁴⁵ Indeed, when adults fail to report known abuse, they may be "serv[ing] to reinforce the abuser's belief that the child deserves the beatings."¹⁴⁶ Critics fear that requiring all persons to report will cause a flood of unreliable reports into the system. It is true that the reports most likely to be substantiated come from mandated reporters.¹⁴⁷ This does not, however, mean that other reporters are inherently unreliable. Non-professionals may be less articulate and poorly equipped to provide the authorities with the necessary facts to commence an investigation. For instance, a blanket assertion that a child is being abused is of little assistance. A skilled intake worker is necessary to draw out all the known facts from a reporter. A public education campaign to inform citizens as to what does, and does not, constitute abuse would help limit poor reports from coming into the system. Others argue mandated reporters will equally benefit from an education campaign.¹⁴⁸

There is no clear indication that the number of reports would increase by requiring all citizens to report suspected abuse. The citizens of sixteen states are already required to report,¹⁴⁹ and nationwide, a significant number of reports are already coming into the system from those previously not required to report. Perhaps many Americans cannot morally stand by and allow a child to be

142. See *People v. Bullard*, 142 Cal. Rptr. 473, 474 (1977); see, e.g., *People v. Aeschilman*, 104 Cal. Rptr. 689, 691-93 (1972) (involving a neighbor failing to report observed abuse).

143. See Collier, *supra* note 141, at 190-191 (discussing the facts of *People v. Bullard*).

144. See *id.*

145. See *id.*

146. *Id.* at 193.

147. See CHILD MALTREATMENT, *supra* note 27 and accompanying text.

148. See Zellman, *supra* note 45, at 117.

149. These states are Delaware, Idaho, Kentucky, Indiana, Maryland, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Wyoming. See CHILD ABUSE AND NEGLECT STATUTES, *supra*, note 121.

abused and will report, even if not mandated by law to do so.¹⁵⁰ If this is true, the law will be aimed at the small category of citizens who become aware of child abuse and look away.¹⁵¹

By requiring all citizens to report suspected child abuse, it may be possible to end the practice of accepting anonymous reports. If a citizen is legally mandated to report, there is no need for secrecy. Removing anonymity will enable the social worker to directly contact the reporter when the need for further information arises. Removing anonymity will also be beneficial to the reporter since it enables him to prove he complied with the law. Citizens concerned about confidentiality can be assured the information is held in trust and the identity of the reporter cannot be disclosed absent

150. See KIRBY PUCKETT, *I LOVE THIS GAME!* 180-81 (1993). Baseball superstar Kirby Puckett is an example of a citizen morally committed to reporting abuse even if not compelled legally to do so. In his autobiography, Puckett relates the following:

I look at a lot of things differently now that I am a parent. I learned from my mom that if I don't know what's going on and I'm not directly involved, I should keep my mouth shut. I still believe that, because I've seen people get in real trouble butting into other people's business, but I now believe there are exceptions to the rule. Four years ago, Tonya [Puckett's wife] and I were riding in a cab from the airport in the Twin Cities to our home, at that time in Brooklyn Park. We passed a car in which a man, the driver, was hitting a boy riding with him in the front seat, slapping him hard enough so that the boy's head hit the dashboard. Another boy sat in the backseat. Tonya started knocking on the window of the cab and shouting. She told our driver to get on his two-way radio and call the police. The cab driver wouldn't do anything and I was also unsure what to do. We finally lost touch with the other car, but not before taking down the license number. The minute we got home Tonya got on the phone to the police. Then she followed up day after day. The child abuse people tracked down the household and found this man and some indications that what we had seen was not a one-time episode. He became one of their cases.

'See!' Tonya said to me. 'We got involved and maybe saved those kids.' She was right. That happened before I was a parent. Today, I wouldn't hesitate in the same circumstances. . . I'd still report that license number immediately.

Id. at 218-219.

151. Consider the recent death of a toddler beaten for refusing to pick up her toys. Only after the child died did neighbors report having witnessed the father assault the child. See Steve Vogel & Susan Levine, *Maryland Man Charged with Abuse After Death of Toddler Daughter*, WASH. POST, Jul. 10, 1997, at D1, D5.

a court order.¹⁵²

Discouraging anonymous reports may serve to eliminate many unreliable and even false reports. In a study of Bronx county, for instance, 87.6 percent of anonymous reports were unfounded.¹⁵³ Nationwide, up to seventy-five percent of anonymous reports are unfounded.¹⁵⁴

Anonymous reports should be discouraged, but not ignored. Some citizens distrust for the government may make them unwilling to disclose their names. In these situations, the intake worker will need to decide if the report is sufficiently detailed and otherwise credible as to justify an investigation. At the very least, an anonymous report can be labeled "information only" and in the event a subsequent, non-anonymous report is received, the two reports can be read together to determine whether an investigation is warranted.

IV. PROPOSED REFORMS TO THE MINNESOTA STATUTE

A. *Require Any Person with Knowledge of Abuse to Report*

To the extent our laws should reflect the core values of our society, it is fundamental that anyone with knowledge of a child's abuse should be compelled to report that abuse. In the words of author Lance Morrow, "[t]he simplest definition of evil begins with whatever makes a child suffer."¹⁵⁵

If we accept that child abuse is an evil and children are ill-equipped to care for themselves, it is irresponsible, even cruel to make a child's protection dependent on whether the first adult to learn of the abuse is mandated to report. Requiring all persons with knowledge of abuse to report does not unfairly burden any member of society. The proposal does not require anyone to investigate the possibility of abuse but simply requires that when, through happenstance, a citizen acquires knowledge of abuse, a report must be made. The "inconvenience" of a phone call pales

152. The name of the reporter can be disclosed "upon a written finding by the court that the report was false and that there is evidence that the report was made in bad faith." MINN. STAT. § 626.556, subd. 11 (1996).

153. See Meriwether, *supra* note 16, at 165.

154. See *id.*

155. Dr. Olson Huff, *Using Force Jeopardizes Children's Well-being*, AAP NEWS, April 1996, at 15.

in comparison to the “inconvenience” further abuse imposes on the child victim. To the extent moral citizens report abuse in any event,¹⁵⁶ the proposed reform may be directed to a minority of Americans whose indifference to abuse society can ill-afford.

Requiring all adults to act affirmatively on behalf of another human being is not a novel concept. Indeed, Minnesota’s “Good Samaritan” law requires individuals to render aid to persons in peril at the scene of an emergency.¹⁵⁷ A society requiring citizens to affirmatively act on behalf of persons involved in emergencies, such as car accidents, can likewise require citizens to report known

156. See MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 35 (1963). Addressing our responsibility to act on behalf of others, Martin Luther King, Jr. observed:

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy. The true neighbor will risk his position, his prestige, and even his life for the welfare of others. In dangerous valleys and hazardous pathways, he will lift some bruised and beaten brother to a higher and more noble life.

Id.

Similarly, Cesar Chavez used the following words to express our obligation to assist those who call in the night:

When we are really honest with ourselves, we must admit that our lives are all that really belong to us. So it is how we use our lives that determines what kind of men we are. It is my deepest belief that only by giving our lives do we find life. I am convinced that the truest act of courage, the strongest act of manliness, is to sacrifice ourselves for others in a totally nonviolent struggle for justice. To be a man is to suffer for others. God help us be men.

ARTHUR M. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* 910 (1978).

157. MINN. STAT. § 604A.01 (1996). Subdivision 1 provides:

Duty to assist. Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violated this subdivision is guilty of a petty misdemeanor.

For detailed discussion of Minnesota’s Good Samaritan law, see Dave Theisen, Note, *The Duty to Rescue and the Good Samaritan Statute*, 8 *HAMLIN L. REV.* 231 (1985).

or suspected cases of child abuse. In both scenarios a life is endangered and in both cases the intrusion on the life of the individual compelled to act is minimal. Indeed, the obligation in the Good Samaritan law may be greater insofar as the statute requires "reasonable assistance."¹⁵⁸ In the area of mandated reporting, the proposed reform requires no assistance beyond making a report.

Civil libertarians may object to the proposal as an affront to personal freedom. Thomas Jefferson himself recognized the rights of adults to be indifferent to the needs of children.¹⁵⁹ Although he advocated a public education system, Jefferson was unwilling to compel parents to educate their offspring. Jefferson thought it "better to tolerate the rare instances of a parent refusing to let his child be educated, than to shock the common feelings and ideas by the forcible asportation and education of the infant against the will of the father."¹⁶⁰ Jefferson would be opposed to our modern system of compulsory education.¹⁶¹ In Minnesota, a parent's failure to educate his children is evidence of neglect which a mandated reporter must disclose to the authorities.¹⁶² Clearly, Minnesota has not fully adopted the Jeffersonian ideal of allowing adult indifference to the needs of children.

In many respects, society imposes on all its members an affirmative obligation to care for those in need. Whether we approve or disapprove, the government compels through taxation our support for a host of social programs of benefit to the poor, the disabled, and the elderly. Our government's failure to force all members of society to act on behalf of abused children may simply be the product of the political impotence of children. Hubert Humphrey recognized this dimension when he said "child abuse has been ignored because children have no political muscle, no effective way of articulating their needs to those of us who write the law."¹⁶³ Since these children cannot alone seek redress, adults must speak for them through the voice of our law. Martin Luther King,

158. MINN. STAT. § 604A.01 (1996).

159. SAUL K. PADOVER, JEFFERSON 169 (1970).

160. *See id.*

161. In apparent recognition of the expansion of education from a privilege to a right, Justice Stanley Reed noted that "opportunities for education, perhaps the most essential element in equality of opportunity, can be said now to be almost a common birthright in our country." JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY* 487 (1994).

162. *See* MINN. STAT. § 626.556, subd. 2(c) (1996).

163. SHELDON E. ENGELMAYER & ROBERT J. WAGMAN, HUBERT HUMPHREY 313 (1978).

Jr. observed that although “[n]o code of conduct ever persuaded a father to love his children,” the law can force fathers “to provide bread for the family.”¹⁶⁴

The proposed requirement that all citizens report known, or suspected, abuse is a long-awaited recognition that when fathers fail to provide bread for, or act directly to harm their family, all of us have an obligation to fill the void. Those unwilling to assume this moral responsibility may continue to adhere to a doctrine of indifference. When, however, this indifference imperils the well-being, even the life, of a child, the government can and should require the individual to act.

B. Require Reports Even When the Abuse is Over Three Years Old

Minnesota’s mandated reporting law appears to be the only law of its kind to limit reports to recent acts of abuse.¹⁶⁵ Minnesota’s requirement that the act of abuse take place within three years from the time the reporter acquires the information is not only contrary to the laws of other states, but is inconsistent with other Minnesota statutes dealing with child abuse. Prosecutors can file criminal charges in a case older than three years¹⁶⁶ and a child can be declared in need of protection or services based on the child’s status as an abuse victim irrespective of when the abuse occurred.¹⁶⁷ Since social workers and police officers can protect children and punish perpetrators even if the abuse occurred more than three years ago, it is surprising the legislature has acted to keep these children out of the system. Given other mandated reporting laws do not seek to protect only recently abused children, it is unlikely this reform will cripple the system. In many cases, reports of older abuse are as, if not more, provable than cases of recent abuse.

C. Require Reports Even if the Perpetrator is Not a Caretaker or in a Position of Authority at the Time of the Abuse

Minnesota’s requirement that a report be made only when the perpetrator is a caretaker or in a position of authority at the time of

164. KING, *supra* note 156, at 37.

165. See CHILD ABUSE AND NEGLECT STATUTES, *supra* note 121.

166. See MINN. STAT. § 628.26 (1996). Sex crimes have a seven year statute of limitations. See *id.*

167. See MINN. STAT. § 260.015, subd. 2a(2)(i) (1996).

the abuse has several shortcomings. First, the statute excludes from protection abused children whose abusers may have regular access to them including siblings and parental boyfriends.¹⁶⁸ Second, the statute encourages abusive parents to fabricate the perpetrator in order to avoid responsibility.¹⁶⁹ A clever child molester, for instance, can tell a physician he agrees the child was molested but the abuse occurred when the child was playing next door and that steps have been taken to keep the child safe from evil at the neighbor's home.¹⁷⁰

Third, conditioning a report on the identity of the perpetrator enables many abusers to re-offend and contributes to the molestation of thousands of children. Child abuse is seldom, if ever, an isolated instance and most abusers continue to prey on children until forced to cease. Men who molest girls have an average of 19.8 victims.¹⁷¹ Men who molest boys average 150.2 victims.¹⁷² In a study of 561 sex offenders, these offenders accounted for the abuse of an astonishing 195,407 children.¹⁷³ Offenders may continue to molest because they realize the chance of being reported is marginal at best. Indeed, the chance of getting caught has been calculated at three percent.¹⁷⁴ Minnesota and the minority of other states not requiring reports on sex offenders based on their identity assist in keeping low the percentage of apprehended abusers and in keeping high the percentage of children abused.¹⁷⁵

Fourth, the present statutory scheme is morally repugnant. The physical and psychological effects of child abuse have been described as "far-reaching, negative, and complex."¹⁷⁶ Generally, the

168. See Meriwether, *supra* note 16, at 155.

169. See *id.*

170. Child abusers are notoriously clever. As one commentator notes, "child molesters particularly try to manipulate their wives or the guardians and parents of their victims, their probation officers, and the court. . . . A child molester can sometimes outwit even the greatest efforts of those involved." LEBERG, *supra* note 9, at 91.

171. See Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERS. VIOL. 3, 17 (1987).

172. See *id.*

173. See *id.* at 17-19.

174. See *id.*

175. At a minimum, 20 percent of American women and five to ten percent of American men endured sexual abuse as children. See David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31 (1994).

176. DEBRA WHITCOMB ET AL., WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 15 (1985).

closer the child's relationship to the perpetrator, the greater is the child's confusion and inability to cope with the abuse. However, sexual abuse by a complete stranger is "horrible and can shatter a child's sense that the world is a safe place."¹⁷⁷ According to therapist Anna Salter, child abuse "leaves footprints on the heart."¹⁷⁸

Twenty-two states recognize child abuse to be an evil irrespective of the perpetrator and require reporters to disclose information concerning a child's physical or sexual abuse.¹⁷⁹ Five states require reports in cases of sexual abuse no matter who the perpetrator is even though identity is a limiting factor in cases of physical abuse.¹⁸⁰ As a matter of public policy, the protection of a child should not depend on the identity of the perpetrator who stomps on the child's heart.

V. MEASURES TO ENSURE THE EFFECTIVENESS OF THE STATUTORY REFORMS

A. *Public Education*

Expanding the mandated reporting law is of no consequence if those obligated to act do not comprehend what is expected of them. Indeed, many current mandated reporters remain unaware of their obligations.¹⁸¹ Jurisdictions that conduct mandated reporter training have improved their ability to protect children.¹⁸² Accordingly, any expansion of the mandated reporting law must include the marshaling of state and local resources to educate citizens about the law.

177. JOHN E.B. MYERS, *A MOTHER'S NIGHTMARE-INCEST* 27 (1997).

178. *Id.*

179. Alabama, Alaska, California, Colorado, Connecticut, Florida, Idaho, Kansas, Louisiana, Massachusetts, Nebraska, Nevada, New Hampshire, Ohio, Oregon, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, Wyoming. See CHILD ABUSE AND NEGLECT STATUTES, *supra* note 121.

180. See GA. CODE ANN. § 19-15-1 (Michie Supp. 1997); IND. CODE ANN. § 31-6-11-1 (West Supp.1996); MD. CODE ANN., FAM. LAW § 5-701 (Michie Supp. 1996); N.D. CENT. CODE § 50-25.1-02 (Michie 1995); UTAH CODE ANN. § 62A-4a-403 (Michie 1997).

181. See *supra* notes 40-43 and accompanying text.

182. See generally Victor I. Vieth, *A Strategy for Confronting Child Abuse in Rural Communities*, PROSECUTOR 15, 16 (Sept./Oct.1994) (discussing new measures taken by Cottonwood County, Minnesota, to combat child abuse in a rural community).

B. Resist the Call to Restrict or Abolish Mandated Reporting Laws

A backlash against child protection efforts continues in the United States.¹⁸³ The backlash movement fears there is an epidemic of false accusations in cases of child abuse.¹⁸⁴ The backlash movement will no doubt resist a call to expand mandated reporting laws. Indeed, critics of the system contend mandated reporting laws should be abolished. Any expansion of mandated reporting laws, then, will not take place unless proponents can adequately respond to the concerns of those who seek a contraction of these laws.

Author Richard Gelles, director of the Family Violence Research Program at the University of Rhode Island, is among those proposing an end to mandated reporting laws.¹⁸⁵ In support of this proposition, Gelles cites three factors favoring the abolition of these laws.¹⁸⁶ First, Gelles objects that "children and families who are reported are disproportionately lower-class and minority. This disproportionate reporting includes both justified and unjustified reports. Similarly, middle-class children are underreported."¹⁸⁷ However, this argument is flawed at the outset. It presupposes that child abuse in upper- and middle-class homes is at equivalent levels to homes burdened by poverty and other debilitating socioeconomic factors. As Gelles himself recognizes, child abuse and neglect is "inextricably linked to the problems of alcohol and drug abuse, unemployment and underemployment, teenage pregnancy, poverty, homelessness, and street violence."¹⁸⁸

Based on the "inextricable" linkage between child abuse and poverty, no one can be surprised that a disproportionate share of the children reported into the system are poor or members of a minority. More importantly, the large numbers of poor and minority children reported into the system is to the advantage, not the detriment of these children. Again, the purpose of the law is to spare children from abuse and neglect by bringing their plight to the attention of those with the power to intervene. Although soci-

183. See generally DAVID HECHLER, *THE BATTLE AND THE BACKLASH* (1988) (discussing current debates over feasibility of anti-child abuse measures).

184. See *id.* at 3.

185. See GELLES, *THE BOOK OF DAVID* 153-155 (1996).

186. *Id.* at 154.

187. *Id.*

188. *Id.* at 167. Gelles advocates for a "concentrated effort to reduce the rate of poverty among children."

ety should improve efforts to rescue abused children in middle- and upper-class homes, we should not abandon poor and minority children simply out of a desire to make the system appear more politically correct on paper. Additionally, it remains unclear as to how abolishing mandated reporting laws would bring more middle- and upper-class children into the system. The apparent argument is that overt or benign racism causes professionals to seek greater protection for poor and minority children. Even if the inherent contradiction in this argument is ignored, abolishing mandated reporting laws will have no impact on cultural insensitivity. A better approach is to bring more minorities into the professions most likely to encounter child abuse. Increasing the number of minorities and improving the cultural sensitivity of professionals whose calling puts them in regular contact with abused children will serve to meaningfully address any racial bias in the child protection system.

Second, Gelles calls for abolishing mandated reporting laws because "mandatory reporting has overwhelmed the child protection system to the point that it can barely conduct investigations and rarely deliver meaningful and effective services."¹⁸⁹ It is certainly true that the system is burdened with thousands of children reported to be in need and that often only those reports alleging the greatest harm can be investigated. A remedy for this malady is to increase the resources of the child protection system, rather than to ignore children who are abused at a level not yet deemed critical. Although abolishing mandated reporting laws may bring fewer cases into the system, it is unlikely that this "reform" would bring only strong cases into the system. Indeed, abolishing mandated reporting laws may prohibit physicians, psychologists and others with a patient/client relationship from disclosing even serious cases of abuse.

Gelles also contends that "mandatory reporting assumes professionals are unwilling to treat child abuse and neglect on their own or, if willing to provide treatment, are less capable at it than state workers."¹⁹⁰ Indeed, Gelles goes so far as to suggest that abolishing mandated reporting laws may *increase* law enforcement involvement by freeing up mandated reporters to call the police with a case of abuse.¹⁹¹ This argument ignores the history of child abuse

189. *Id.* at 154.

190. GELLES, *supra* note 185, at 154.

191. *See id.* at 155.

in America. If professionals were reporting child abuse at the start of the abuse, there would be no need to have enacted mandated reporting laws. Despite the reporting laws, many mandated reporters choose not to report.¹⁹² As for the contention that abolishing mandated reporting laws will increase police involvement, the argument does not take into account that in states such as Minnesota, a mandated reporter can report directly to law enforcement and still be in compliance with the statute.¹⁹³ In states requiring the report to go initially to social services, a cross report to law enforcement is usually made.¹⁹⁴ Even if the referral is not made, this does not mean a mandated reporter cannot also contact law enforcement with the information.

Finally, suggestions that professionals may be as capable of addressing child abuse as state workers is patently untenable. Only the government can remove a child from an abusive home, incarcerate those responsible for the abuse, and compel a family to seek therapy. Removing the state from child protection efforts is to strip these efforts of the power to coerce recalcitrant families to reform.

C. *Provide Adequate Resources to Investigate Cases of Abuse*

Nationwide, a large number of reported cases are not investigated due to a lack of resources.¹⁹⁵ According to one study, an estimated 931,000 children were harmed by abuse or neglect in 1986.¹⁹⁶ To fit within this category, the child must "have suffered demonstrable harm as a result of the maltreatment."¹⁹⁷ Of the children falling within this definition in 1986, only forty-four percent had their cases investigated by child protection authorities.¹⁹⁸

192. See *supra* notes 44-49 and accompanying text.

193. See MINN. STAT. § 626.556, subd. 3(a) (1996).

194. GELLES, *supra* note 185, at 155 (stating the social service system is "generally responsible for making criminal justice referrals").

195. As one example, supervisors in Prince William County, Virginia were asked in 1997 to hire new social workers and increase the social service budget by \$324,000. If additional funds were not approved, the social service agency representative anticipated that some cases would not be investigated. See Justin Blum, *Case Loads are Threats to Probes*, WASH. POST, Aug. 30, 1997, PRINCE WILLIAM EXTRA, at 1, 5.

196. ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T. OF HEALTH & HUMAN SERVS., THIRD NAT'L INCIDENCE STUDY OF CHILD ABUSE & NEGLECT 3-3 (Sept. 1996).

197. See *id.* at 2-9.

198. See *id.* at 7-16.

In 1993, an estimated 1,555,800 children were harmed by abuse or neglect,¹⁹⁹ while only twenty-eight percent of these children had their cases investigated by child protection authorities.²⁰⁰ This study found it “[e]specially remarkable. . . that CPS investigation extended to only slightly more than one-fourth of the children who were seriously harmed or injured by abuse or neglect” and concluded “[t]his picture suggests that the CPS system has reached its capacity to respond to the maltreated child population.”²⁰¹

Following the proposed reforms by bringing a greater number of abused children into Minnesota’s child protective services will require a corresponding increase in the number of social workers, police officers, and prosecutors who will investigate these cases and bring them to court. To do otherwise is to give abused children a false hope.

VI. CONCLUSION

Child abuse has been described as evil, a mutilation of the spirit, and as a footprint on the heart. While most Americans adhere to these poetic sentiments, mandated reporting laws such as that in Minnesota, function to keep thousands of abused children out of the very system designed to protect them and to apprehend those who prey on their minds and bodies. Although no law can bring every child under the tent of protection, three reforms would enable Minnesota to shelter more of its children. First, every adult should be required to report known or suspected abuse. Second, all suspected abuse should be reported, irrespective of when the act took place. Third, abuse should be reported, irrespective of the identity of the perpetrator. Failure to act guarantees other children will suffer at the hands of perpetrators remaining in the community.

Minnesota must not expand its mandated reporting law without preparing for the expected increase in the number of reports. Expanding the reporting law, will be an empty gesture unless it is accompanied by a public education campaign to improve the quality of the reports and a commitment to increase investigative and

199. *See id.* at 3-3.

200. *See id.* at 7-16.

200. *See id.* at 8-16.

prosecutorial resources.